Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number HU/07939/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 November 2018	**On** 11 January 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR MOHAMMAD RASALMIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes, Counsel instructed by Thamina Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh and his date of birth is 7 November 1979. He made an application for indefinite leave to remain (ILR) which was refused by the Secretary of State on 3 March 2016 under and paragraphs 276B and322 (2) of the Immigration Rules. The Appellant appealed against the decision. His appeal was dismissed by First-tier Tribunal Judge Bartlett in a decision which was promulgated on 18July 2017. The Upper Tribunal refused to grant the Appellant permission to appeal. That decision was quashed and permission granted by Vice

President of the Upper Tribunal C M G Ockelton on 28 August 2018 following a decision of the High Court. Thus the matter came before me on 22 November 2018 to decide whether Judge Bartlett erred.

The Decision of the First-tier Tribunal

2. Judge Bartlett summarised the Appellant's immigration history at paragraph 2 of his decision. The Appellant came to the UK on 1st September 2005 with entry clearance as a student. He was granted leave on various occasions thereafter. On 16 July 2014 the Secretary of State refused an application made by the Appellant on 29 May 2014for leave as a Tier 1 (Entrepreneur). The Appellant appealed. His appeal was dismissed in a decision of the FTT on 17 December 2014 under paragraph 322(1A) of the Immigration Rules on the basis that the judge hearing that appeal was satisfied that the Respondent had established that the Appellant submitted false bank statements (from City Bank) with his application.

3. In the appeal before Judge Bartlett the Respondent did not accept that the Appellant had ten years' lawful residence. The Appellant gave evidence at the hearing. He focussed on the issue under paragraph 322(2). The Respondent relied on a Document Verification Report (DVR) in respect of the documents from City Bank on which the Appellant relied in his application in 2014.

4. The Appellant's evidence was that the documents that he submitted with his Tier 1 application of 29 May 2014 were not fraudulent. The Appellant's evidence was that the contact number on the DVR for City Bank Ltd that the Respondent had identified was a mobile telephone number. He had searched the internet and had not found mobile telephone numbers for the bank. As the DVR did not identify the details of the person contacted at the bank he claimed that it was defective. His evidence was that the documents from City Bank Ltd were genuine. In addition, he submitted an additional letter from City Bank Ltd of 17 December 2014 addressed to his solicitors and a letter of 18 June 2017 from the bank. The original of the latter document he produced at the hearing before Judge Bartlett.

5. The judge directed himself in relation to Devaseelan (Second Appeals – ECHR-Extra-Territorial Effect) Sri Lanka. The judge found that the submissions in relation to the 2014 determination were an attempt to re-open the earlier decision despite the rejection of such arguments by both the First-tier Tribunal and the Upper Tribunal in their refusal to grant permission. He found there was no good reason to depart from the findings made by the judge in 2014. He went on to consider the veracity of the documents in the light of the evidence now produced by the Appellant. The judge noted that the bank documents from City Bank Ltd in dispute concerned the Appellant's uncle's account with that bank. There was no issue with the Appellant's own bank account. The judge took into account what the Appellant said about the DVR. However, the judge concluded, at paragraph 24, that he did not consider that the Appellant's

evidence to carry much force and that it was perfectly reasonable to expect the Home Office to have special contact telephone numbers for some financial institutions and that these numbers are not publicly available. He found that the fact that a mobile telephone number was used rather than a landline was entirely immaterial. The judge went on to find that the DVR was clear and reject the Appellant's case. The judge considered the evidence now submitted by the Appellant and found internal anomalies within those documents. The judge found when all factors were considered the Respondent had discharged the burden of proof and established that the documents that the Appellant relied on were false. The judge went on to state that the Appellant had made false representations for the purpose of obtaining leave and that therefore the Appellant fell within paragraph 322(2) and did not satisfy paragraph 276B(ii)(c) and paragraph 276B(iii)[1].

6. The judge considered whether the Appellant had accrued ten years continuous lawful residency in the UK noting that he had made an application for leave to remain on the basis of his private and family life on 22 June 2015 which was as the judge found "within the 28 day 'grace' period and pursuant to the Respondent's guidance and policy the Appellant had Section 3C leave from this date". The judge made the following findings:-

> "30. Mr Singer submitted that this application was varied on 5 August 2015 which was before the Respondent rejected the Appellant's application dated of 22 June 2015. I accept Mr Singer's submission. The Respondent's letter dated 29 September 2015 purporting to reject the Appellant's application dated 22 June 2015 as invalid makes no mention of 5 August 2015 and as such it cannot be an affective refusal or rejection. The letter from the Appellant's solicitors dated 5 August clearly states that this 'application' was a variation. The Respondent's guidance and policy is to permit applications to be varied and under Section 3C

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[1]Paragraph 276B (ii) reads as follows:-

"Having regard to the public interest there were no reasons why it should be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:-

(a) age;

(b) strength of connections in the United Kingdom;

(c) personal history, including character, conduct, associations and employment records; and

(d) domestic circumstances; and

(e) previous criminal record and the nature of any offence of which the person has been convicted; and

(f) compassionate circumstances;

(g) any representations received on the person's behalf.

Paragraph 276B (iii) reads as follows:

"the applicant does not fall for refusal under the general grounds for refusal".

of the Immigration Act 1972 leave continues. I consider that this is supported by JH (Zimbabwe) v SSHD [2009] EWCA Civ 78. As is made clear in JH (Zimbabwe) the fact that the Appellant had little prospect of success in his 22 June 2015 application is not material for Section 3C leave purposes. Therefore the Appellant can satisfy paragraph 276B(v).

31. However, this does not mean that the Appellant has established ten years' continuous residency. As a result of my analysis above I have found that the Appellant's application dated 5 August 2015 commenced on 22 June 2015, 5 August 2015 letter from the Appellant's representative, sets out that it is a variation of 22 June 2015 application and not a new application. I consider that this is the correct analysis, particularly in light of my findings above. Therefore as the Appellant made an application on 22 June 2015 on the basis of ten years' continuous lawful residency, he made this application more than 28 days before he would have acquired ten years' continuous residence in the United Kingdom (as he arrived on 1 September 2015 he would have acquired ten years' residency on 1 September 2015 as it is not claimed there were any other gaps in residency). The Respondent's guidance in this area is clear and she will only accept applications on the basis of ten years' continuous lawful residency if they are 28 days or less before the ten year period has accrued. As the Appellant's application commenced on 22 June 2005, this is substantially in excess of the 28 days. Therefore at the date of application he had not accrued ten years' residency whether lawful or not.

32. I consider that there are no policy reasons why my above analysis should not be applied. The Respondent's policy of allowing individuals to apply a maximum of 28 days before they have acquired ten years' residency is a pragmatic administrative matter. To allow individuals to put an application substantially in advance of the 28 days by means of making entirely different applications and then varying to a ten years' continuous lawful residency application, which they could do a number of times, would potentially undermine the certainty and purpose of the ten year residency Rule.

33. Therefore I find that the Appellant cannot satisfy paragraph 276(i)(a).

34. No evidence has been provided to me that the Appellant's wife and child are not still in Bangladesh and therefore I find that the Appellant cannot satisfy Appendix FM.

35. I consider that as the Appellant has strong family ties to Bangladesh in the form of his wife, child and uncle they can help him to reintegrate into Bangladesh. I find that the Appellant speaks the language in Bangladesh and spent his first 26 years in Bangladesh including years in education. I consider that the Appellant has family support and he will be able to find work and reintegrate into Bangladesh. Therefore the Appellant cannot satisfy paragraph 276ADE(1)(vi).

36. Despite all of the above this is an appeal based on Article 8 ECHR. Therefore I have given consideration to Section 117C of the 2002 Act.

37. I find that the Appellant can speak English as he was able to participate fully in the hearing. I have no information about the Appellant's financial means at the date of this appeal and therefore he has not discharged the burden of proof to show that he is financially independent. The Appellant has been in the United Kingdom lawfully but he does not have a qualifying child or partner here.

38. When considering Article 8 ECHR outside the Immigration Rules I have given due consideration to Agyarko v Secretary of State for the Home Department [2017] UKSC 11 and its guidance that 'it remains the position that the ultimate question is how a fair balance should be struck between the competing public interest in individual interests involved, applying a proportionality test.'

39. Therefore I must consider the five step test set out in Razgar, R (on the Application of) v SSHD [2004] UKHL 27. I find that the Appellant does not have family life in the United Kingdom and therefore he has no family life here. In relation to a private life I accept that the Appellant has been in the United Kingdom for a substantial period of time and he will have formed some sort of private life here. However, as set out above for there to be an interference in the Appellant's private life his moral or physical integrity must be compromised. I do not accept that this is so in this appeal and I do not consider that any evidence has been provided that could discharge the burden of proof in this respect. Further, I find that the Respondent's decision is in accordance with the Immigration Rules and the Appellant has not satisfied the Immigration Rules as detailed above. I have found that the Appellant has committed fraud in relation to his 2014 appeal and since then I consider that he cannot establish any unfairness in his treatment. Therefore I find that the Respondent's decision is proportionate to the legitimate aim of immigration control."

7. There was only one ground of appeal pursued before the High Court. That was that the judge did not properly apply paragraph 34G[2] of the Immigration Rules. The decision reads as follows:-

> "The amended grounds, settled by counsel, rely on one ground, namely, that applying Rule 34G(i) of the Immigration Rules, the varied application should have been treated as if had been made in August 2015 (the date of posting), not June 2015 (the date of the original application). The First-tier Tribunal (FTT) erred in treating it as made in June 2015.
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> In my judgment this ground is clearly arguable.
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> The Upper Tribunal did not address this point.
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> If the Claimant's analysis is correct, it could make a difference to the outcome. The FTT found at paragraph 31 that the Claimant he would have acquired ten years residency on 1 September 2015, and the Defendant would accept applications on the basis of ten years residency if they were made 28 days or less before the ten year period has accrued. The date in August was 28 days or less before the ten-year period accrued, but the date in June was not, so the difference was significant".

Error of Law

8. The focus of the error is what is stated by Judge Bartlett at paragraph 31 of his decision. Properly applying paragraph 34 of the Rules, the date of the application was 5 August 2015 and therefore within 28 days before the ten- year period accrued and therefore on this analysis, as conceded by Mr Walker, in the absence of a counter challenge to the findings made by Judge Bartlett, the Appellant accrued ten years' lawful continuous residence. For this reason, the judge erred and I set the decision aside.

Conclusions

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[2]The relevant rules read as follows:-

> "**Variation of Applications or Claims for Leave to Remain**
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> 34E. If a person wishes to vary the purpose of an application for leave to remain in the United Kingdom, the variation must comply with the requirements of paragraph 34 (as they apply at the date the variation is made) as if the variation were a new application. If it does not, subject to paragraph 34B, the variation will be invalid and will not be considered.
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> …
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> **Date and application (or variation of an application) for leave to remain is made**
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> 34G. For the purposes of these Rules, the date on which an application (or a variation of application in accordance with paragraph 34E is made is:
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> (1) where the paper application form is sent by post by Royal Mail, whether or not accompanied by a fee waiver request form, the date of posting is shown on the tracking information provided by Royal Mail or, if not tracked, by the postmark date on the envelope or
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> …

9. Mr Symes asked me to adjourn the matter to enable the Appellant to submit further evidence. I questioned why the Appellant had not produced further evidence in accordance with directions issued by the Upper Tribunal on 11 September 2018. Mr Symes explained that the Appellant was privately paying and that his previous solicitors had not advised him to produce further evidence before the finding of an error of law. Mr Symes accepted that his was not the right way of doing things but that it was the current state of play. I understood from Mr Symes that the Appellant's current solicitors had been representing him for a week. There was no adequate explanation why they had not taken it upon themselves to prepare further evidence in the event of the remaking of the appeal. Mr Walker did not object to an adjournment; however, he did not provide me with a reason for this. There has been protracted litigation over a significant period. The Appellant has been represented throughout and I reasonably infer that he is aware of the issues in his case and that it has been explained to him by those representing him that lawful continuous residence was not determinative of his appeal. There was no satisfactory explanation to account for the failure to prepare the Appellant's case and submit further evidence. There was no properly identified evidence that may become available in the event of an adjournment. There was no good reason drawn to my attention to justify an adjournment. It was very much in the public interest, applying the overriding objective, to proceed to remake the appeal on the evidence before the FTT. I heard submissions from both parties.

10. Judge Bartlett concluded that the Appellant did not satisfy paragraph 276B(ii)(c). It is clear that what he meant by this is that when considering the public interest and the Appellant's conduct it would be undesirable to grant him ILR. There is no challenge to this conclusion. In any event, as properly found by Judge Bartlett, the Appellant cannot meet the requirements under the Rules with reference to paragraph 276B (iii).

11. The judge accepted that the Appellant had been in the UK for a significant period and that he would have formed some sort of private life here. There was no further evidence before me. The Appellant has significant family ties to Bangladesh (see paragraph 35 of Judge Bartlett's decision). The judge did not have before him information relating to the Appellant's financial means and found that he was not financially independent. Whilst the Appellant has been given the opportunity to produce further evidence in support of his appeal, there was before me no evidence over and above the evidence that was before Judge Bartlett. There was no reason for me to go behind the findings of the FTT under paragraphs 267B (ii) or (iii) or as regards the wider article 8 assessment.

12. The Appellant cannot meet the requirements of the Rules and has failed to produce evidence which is capable of establishing compelling circumstances. The decision is proportionate taking into account the circumstances in this case and s117B of the 2002 Act.

13. The appeal is dismissed under Article 8.

No anonymity direction is made.

Signed Joanna McWilliam Date 11 January 2019